CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 25

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, AS SOLE RESIDUARY LEGATEE AND DISTRIBUTEE OF THE AMERICAN ESTATE OF WILLIAM J. ORTHWEIN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1935
CERTIORARI GRANTED MAY 20, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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a (Order Extending Time to File Record to May 31, 1934.)

United States Board of Tax Appeals.

Commissioner of Internal Revenue, Petitioner,
Docket No. 47633. vs.
St. Louis Union Trust Company as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Dec'd, joined by Mercantile-Commerce Bank & Trust Co., Successor Trustee to Mercantile Trust Co., of the Trust created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Respondent.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals, Eighth Circuit, be and is hereby extended to May 31, 1934.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
April 28, 1934.

Now, May 21, 1934, the foregoing order certified from the record as a true copy.

(Seal)

B. D. GAMBLE,
Clerk, Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on May 26, 1934, E. E. Koch, Clerk.

1 Docket Entries.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Co. Estate of William J. Orthwein, deceased, Petitioner,
Docket No. 47633. vs.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpayer: D. N. Kirby, Esq.,

For Comm'r.: F. T. Horner, Esq., R. F. Stanbly, Esq., T. F. Callahan, Esq., W. H. Payne, Esq.

1930
Feb. 24—Petition received and filed. Taxpayer notified. (Fee paid)

" 25—Copy of petition served on General Counsel.

Apr. 23—Answer filed by General Counsel.

" 28—Copy of answer served on taxpayer. General Calendar.

1932
Feb. 8—Hearing set April 19, 1932.

Apr. 15—Motion for 30 days continuance filed by taxpayer. 4/16/32 granted to June 1, 1932.

Jun. 1—Hearing had before Mr. Arundell on merits. Respondent moves to continue to Fall Calendar—granted.

" 1—Order of continuance to the Fall Term of 1932 entered.

Aug. 8—Motion for leave to amend petition filed by taxpayer. Amended petition tendered. 8/10/32 granted. 8/12/32 copy served.

" 17—Hearing set Oct. 17, 1932.

Oct. 5—Answer to amended petition filed by General Counsel. 10/7/32 copy served.

" 17—Hearing had before Mr. Black on motion to continue one week. Stipulating.

" 17—Order of continuance to Oct. 24, 1932 entered.

" 19—Stipulation of facts filed.

" 24—Hearing had before Mr. Smith. Submitted on stipulation of facts and record. Briefs due in 30 days.

Dec. 14—Brief filed by taxpayer.

" 17—Brief filed by General Counsel.

1933

May 16—Findings of fact and opinion rendered, Mr. Smith, Div. 5. Judgment will be entered under Rule 50.

Nov. 25—Notice of proposed redetermination filed by General Counsel.

" 28—Hearing set Dec. 13, 1933 on settlement.

Dec. 13—Hearing had before Mr. Trammell on settlement under Rule 50. Referred to Mr. Smith for decision.

" 14—Consent to settlement filed by taxpayer.

" 16—Decision entered, Charles P. Smith, Div. 5.

1934

2 Mar. 3—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by General Counsel.

Mar. 10—Proof of service filed by General Counsel.

Apr. 28—Praecipe filed—proof of service thereon.

" 28—Motion for extension to 5/31/34 to complete record filed by General Counsel.

" 28—Order enlarging time to May 31, 1934, for preparation of evidence and delivery of record entered.

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3 (Petition of St. Louis Union Trust Company, as Successor Trustee, etc., et al., for Appeal.)

Filed Feb. 24, 1930, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

St. Louis Union Trust Company, as successor trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased; joined by Mercantile Commerce Bank & Trust Company, Successor trustee to Mercantile Trust Company, of the trust created by trust indenture of William J. Orthwein, dated January 1, 1920,

Petitioners,

Docket No. 47633. vs.

Commissioner of Internal Revenue, Respondent.

(A) Jurisdiction. This appeal is from a proposed deficiency in Federal Estate Tax against the American estate of William J. Orthwein, First District of Missouri.

The "Liberty Central Trust Company", organized and doing business as a Trust Company under the laws of the State of Missouri, was named as Executor of the American Estate of William J. Orthwein, who died in Switzerland, September 4, 1925, a resident of Switzerland, and leaving a substantial estate in America (a large part of which was situated in St. Louis, Missouri), of which the will appointed said Liberty Central Trust Company Executor. Said Liberty Central Trust Company probated, in the Probate Court, City of St. Louis, an authenticated copy of said will, and, pursu-
4 ant to the laws of Missouri, thereupon duly received letters testamentary and took charge of, and administered, said American estate under the jurisdiction of said Probate Court. The will appointed "La Société de Banque Swiss" (Swiss Bank Corporation) Branch of Lausanne", located at Lausanne, Switzerland, executor as to all his estate except that in America. This Swiss Bank Corporation took charge as domiciliary executor, and administered the estate under the jurisdiction of the "Court of Peace (Authority of Successions) of the Cercle of Montreux". The American administration was and is ancillary to that in Switzerland.

In due course said Executor made final distribution of the residue of the estate to itself as trustee of the trust created by said will, and was discharged as executor. Thereafter, the "St. Louis Union Trust Company", a Trust Company organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Company as trustee of said trust, and took over the said trust estate. Consequently, the St. Louis Union Trust Company, as sole distributee of the residue of said probated estate, is the legal successor in title and liability to said "Liberty Central Trust Company", Executor, and said trust estate in the hands of said St. Louis Union Trust Company as trustee, will have to pay any additional estate tax that may be assessed and therefore is one of the Petitioners herein.

The "Mercantile Commerce Bank and Trust Company", of St. Louis, Missouri, is successor trustee to "Mercantile Trust Company" of the trust created by Trust Indenture made by said William J. Orthwein, dated January 1, 1920, and it
5 joins in this appeal because the Commissioner seeks to include within the estate of William J. Orthwein, the assets that constituted the corpus of said last named trust estate.

(B) Amount Etc., of Alleged Deficiency. The amount of the alleged deficiency is Fifteen Thousand Five Hundred

Sixty-five Dollars Eighteen Cents ($15,565.18), and the nature of the tax is a Federal Estate Tax. Petitioners are unable to state the exact amount of tax in controversy, but it will be such amount as rests upon the determination of the respective assignments of error herein set out.

(C) Assignments of Error.

(1) Under the title "Transfers", the Commissioner erroneously treats as part of the estate, what is described in the statement attached to the notice of deficiency as "Remainder Value of Property Transferred in Trust $34,544.06".

This item covers the above mentioned trust estate created by Trust Indenture made by decedent January 1, 1920, whereby he transferred and delivered absolutely and irrevocably to the Mercantile Trust Company, as trustee, the assets in the above amounts that are now erroneously sought by the Commissioner to be treated as assets of decedent at the time of his death.

Said conclusion of the Commissioner is contrary to the expressed provision of Article XI, Regulations 68, and is contrary to the facts and to the law under the facts. Said assets may not validly be included in the estate of decedent.

(2) The Commissioner erred in respect of the item entitled "Jointly Owned Property, Items 1 to 5 inclusive", re-
6 turned at Forty-one Thousand Nine Hundred Fifty-six Dollars Twenty-five Cents ($41,956.25) determined at Eighty-four Thousand Three Hundred Fifty Dollars ($84,350.00) as shown in said notice of deficiency, in treating same as taxable at all.

According to Petitioner's present information, the property referred to consisted at the time of the death of William J. Orthwein of an interest in the nature of a joint tenancy with right of survivorship, created by a "Joint Account Agreement", entered into by said William J. Orthwein with his daughter, several years before his death. According to such information as petitioners now have, pursuant to said right of survivorship, the entire title belonged to his daughter at his death and he had no taxable interest therein.

Therefore, the Commissioner erred in seeking to include said item in the property owned by said decedent at the time of his death. If the proofs expected shortly from Switzerland, show that the legal nature of the relation was a tenancy in common, then one half only of said amount should have been included.

(3) Funeral Expenses.

The Commissioner erred in not allowing as a deduction, the sum of, to-wit, $11,317.21 paid by the executor in Switzerland, as the expenses of the funeral of decedent.

(4) Executors Commissions.

The Commissioner erred in not allowing as a deduction, the sum of, to-wit, $20,793.16, Executor's commissions paid in respect of the American probate administration, and the additional sum of, to-wit, $1,252.36, paid in respect of the Swiss administration.

7 (5) The Commissioner erred in not allowing as deductions the sum of, to-wit, $7600.00 as attorneys' fees paid in respect of the American administration and, to-wit, $2,038.99, paid in respect of the Swiss administration.

(6) The Commissioner erred in not allowing as deductions, being miscellaneous administration expenses, the following amounts:

(a) The sum of, to-wit, $199.50 paid for Probate Court costs plus $40.78 for documentary stamps, in respect of the American administration, and, to-wit, $1,353.99, costs paid in respect of the Swiss administration.

(b) The sum of, to-wit, $459.41, paid for traveling expenses, to and from New York and Washington, in respect of the American estate.

(c) The sum of, to-wit, $307.71 paid by the American Executor for general administration expenses.

(7) The Commissioner erred in not allowing as deductions, being debts of decedent paid by his executors respectively the following amounts:

(a) Claim allowed by Probate Court, City of St. Louis, in favor of Liberty Central Trust Company, on note, paid by American Executor,	$16,668.47
(b) Claim of Frank Everts, allowed by same Probate Court, and paid by American Executor,	1,229.67
(c) Claim of Arthur Feuerbacher, et al., allowed by same Court, and paid by American Executor,	$ 8,589.36

8 (d) Claim of Liberty Central Trust Company as Custodian, allowed by same Court and paid by American Executor, $ 350.00

(e) Claim of Espenhain Estate Company, allowed by same Court and paid by American Executor, 3,150.00

(f) Debts paid by Swiss Executor pursuant to the usual course of the Swiss administration, which Petitioners are now informed does not require prior allowance by the Swiss Court, $46,750.48

(g) Taxes, decedent's indebtedness for which accrued before his death, and which were therefore debts of decedent, and paid as such, by the respective Executors: In America:

Item I: Additional Federal Income taxes for 1922, $ 933.40

Item II: Additional Federal Income taxes for 1923, 786.95

Item III: Federal Income taxes for 1925, part of year prior to death, 1,578.46

Item IV: State property tax, on personal property, for 1925, a debt before death, 645.00

Item V: State property taxes for 1925 on real estate in Utah, 25.56

Item VI: Taxes,—we understand this to be property and other taxes owed by decedent,—paid by the Swiss Executor, $15,211.99

(8) The estate is entitled Art. 9 (a), Regulation 68, to a credit for estate, inheritance, legacy, or succession taxes, to an amount paid, but not more than 25% of the Federal
9 Estate tax as ultimately determined.

The Commissioner in said deficiency letter has allowed a credit on this item of $6,009.85, being the amount of inheritance taxes paid to the State of Missouri only.

In so doing, he has erred in failing to take into account the following amounts paid to other states: Utah, $292.08; Connecticut, $74.00; New York, $103.12; New Jersey, $252.89; Virginia, $44.80. Total with Missouri, $6793.03.

(D) The Facts.

Assignment No. (1). The Transfer referred to in this assignment of error, consisted of a Trust Indenture made by decedent January 1, 1920, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, aggregating in their principal face amount $118,000.00, in trust to hold, manage and dispose of as an active trust, to pay the net income thereof to his daughter during her life. The indenture shows conclusively that the trust settlement thereby made, and the trust estate transferred, were made and transferred absolutely and irrevocably. The Grantor retained no power of revocation or alteration. He could do nothing to revoke or alter the fact that he had parted completely and irrevocably with the assets that constituted the trust estate. The only possible interest retained by him was a mere contingent remainder, the vesting of which depended upon the happening of contingencies over which he had absolutely no control, namely, the death of his daughter before his death, plus the then existence of the trust.

The trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived. These facts destroyed the possibility of any remainder ever vesting in the Grantor, said William J. Orthwein. It follows that at his death he had no taxable interest in this trust estate.

The attempted inclusion by the Commissioner of $34,544.06 as representing the trust estate at the time of decedent's death is contrary to the law and to Art. II, Regulation 78, then in force.

(2) Jointly Owned Property; Assignment No. (2).

The information held by Petitioners at this time, is not complete as to all the facts necessary to be known concerning this item. According to their present information the facts are, that several years before the death of decedent, he entered into a "Joint Account Agreement" with his daughter, by which certain property, valued at the time of his death at, to-wit, $41,946.25, was thereafter to be subject to said agreement as a joint account. According to Petitioner's present information the legal effect of said agreement was to create an estate in the nature of a joint tenancy between decedent and his daughter, with the right of survivorship.

If this information proves to be correct, then the entire title was vested at the time of decedent's death in his daughter and no part should be treated as a part of his estate.

If the legal effect of the facts, when fully known, is that decedent and his daughter each owned an undivided one-half interest in said Joint Account, then one-half only should be included within decedent's estate.

11 Petitioners have sent for authenticated copies of the contract itself, and for proofs of the other relevant facts, and are informed that said papers will reach them from Switzerland before the end of February, 1930, at which time they will be made available for the information of the Commissioner and of the Board of Tax Appeals.

(3) Assignments Nos. (3) to (8) inclusive.

The relative facts, so far as known to Petitioners, are sufficiently stated above in said assignments.

Petitioners are expecting to receive from Switzerland, before the end of February, 1930, authenticated copies of the relevant Probate Court records, and of the documents and other papers necessary to furnish the facts in detail and the proofs needed in relation to the Swiss estate.

These papers were ordered and a Swiss attorney employed to obtain them, and Petitioners are advised that the long delays of officials in Switzerland have prevented the papers being here in time for presentation to the Bureau before it became necessary to file this appeal.

Prayer for Relief.

Petitioners respectfully pray: that the above respective Assignments of Error be sustained; that the respective amounts alleged in said Assignments to have been erroneously included within said estate be excluded; that said re-

12 spective amounts, as to which the Commissioner is above alleged to have erred in not allowing them as deductions, be allowed as deductions; that said respective amounts, as to which it is above alleged that the Commissioner erred in not allowing them as credits, be allowed as credits; and that the tax be redetermined in accordance with the decision of the Board upon said various Assignments of Error, and that judgment be entered accordingly.

ST. LOUIS UNION TRUST COMPANY,
By H. J. Miller,
Asst. Trust Officer.

MERCANTILE-COMMERCE BANK & TRUST COMPANY,
By Joseph W. White,
Trust Officer.

Daniel N. Kirby,
Room 918 Security Building,
St. Louis, Missouri.

Arthur E. Kammerer,
411 North Seventh Street,
St. Louis, Missouri,
Counsel for St. Louis Union Trust Company.

Edgar H. McCulloch,
Counsel for Mercantile-Commerce
Bank & Trust Company,
c/o Mercantile-Commerce B. & T. Co.
St. Louis, Mo.

State of Missouri,
City of St. Louis—ss.

H. J. Miller, of lawful age, being duly sworn upon
13 oath, states that he is Assistant Trust Officer of St. Louis Union Trust Company, was Trust Officer of Liberty Central Trust Company, and has had personal charge for said trust companies of all of the administrations, (both probate and trust administrations), upon the estate of William J. Orthwein, of which said trust companies, or either of them, have at any time had charge. That he is personally familiar with all of the facts relating to the American administration of the will of William J. Orthwein, the decedent named in the foregoing petition, and has also conducted the correspondence that has been conducted by said trust companies, or either of them, with the Swiss executor of said will; and that the facts stated in the foregoing petition are true to the best of affiant's knowledge, information and belief.

H. J. MILLER.

Subscribed and sworn to before me this 20th day of February, 1930.

H. A. MAGOON,
(Notarial Seal) Notary Public.

My commission expires June 3rd, 1930.

State of Missouri,
City of St. Louis—ss.

Joseph W. White, of lawful age, being duly sworn upon oath, says that he is Trust Officer of the Mercantile-Commerce Bank & Trust Company, of St. Louis, Missouri, which

company joins as a petitioner in the foregoing petition
14 because it has had charge since the creation thereof, of the trust estate created by William J. Orthwein, the within named decedent, by his Trust Indenture therein mentioned as dated January 1, 1920; that affiant has personal knowledge of the creation of said trust and of the administration of said trust estate by the Mercantile Trust Company and by the Mercantile-Commerce Bank & Trust Company, its successor trustee.

That the facts stated in the foregoing petition in relation to said trust and trust estate are true to the best of affiant's knowledge, information and belief.

JOSEPH W. WHITE.

Subscribed and sworn to before me this 20th day of February, 1930.

NELLIE GROGAN,
(Notarial Seal) Notary Public.

My commission expires Dec. 28, 1930.

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15 (Answer of Commissioner of Internal Revenue.)

Filed April 23, 1930, United States Board of Tax Appeals.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayers, admits and denies as follows:

(A). Denies so much of the paragraph of the petition designated (A) as alleges that The Swiss Bank Corporation took charge as domiciliary executor, and administered the estate under the jurisdiction of the "Court of Peace (Authority of Successions) of the Cercle of Montreux", and that the American administration was and is ancillary to that in Switzerland, and admits all other allegations contained in said paragraph of the petition designated (A).

(B) Admits so much of the paragraph of the petition designated (B) as alleges that the amount of the deficiency is Fifteen Thousand Five Hundred Sixty-five Dollars
16 and Eighteen Cents ($15,565.18), and that the nature of the tax is a Federal estate tax, and denies all other allegations contained in said paragraph of the petition designated (B).

(C) Denies that the respondent, in determining the deficiency tax, committed errors as alleged in the paragraph of the petition designated (C).

(D) (1). Admits so much of subdivision (1) of the paragraph of the petition designated (D) as alleges that the transfer referred to in this assignment of error consisted of a Trust Indenture made by decedent January 1, 1920, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, and that the trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived him, and denies all other allegations contained in said subdivision (1) of the paragraph of the petition designated (D).

(D) (2) and (3) Denies the allegations contained in subdivisions (2) and (3) of the paragraph of the petition designated (D).

(E) Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
Frank T. Horner,
Special Attorney,
Bureau of Internal Revenue.

FTH/RFS/y 4/22/30

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17 (Amended Petition of St. Louis Union Trust Company, as Successor Trustee, etc., et al., for Appeal.)

Filed Aug. 10, 1932, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

St. Louis Union Trust Company, as successor trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased; joined by Mercantile-Commerce Bank & Trust Company, Successor trustee to Mercantile Trust Company, of the trust created by trust indenture of William J. Orthwein, dated January 1, 1920,
Petitioners,

Docket No. 47,633. vs.
Commissioner of Internal Revenue, Respondent.

(A) Jurisdiction. This appeal is from a proposed deficiency in Federal Estate Tax against the American estate of William J. Orthwein, First District of Missouri.

The "Liberty Central Trust Company," organized and doing business as a Trust Company under the laws of the State of Missouri, was named as Executor of the American Estate of William J. Orthwein, a citizen of the United States of America, who died in Switzerland, September 4, 1925, a resident of Switzerland, domiciled there, and who left a substantial estate consisting of: (a) Intangible personal property, (choses in action, stocks and bonds) a substantial part of which was evidenced by stock certificates located in the
18 United States, (chiefly in St. Louis, Missouri), representing shares of stock in corporations domestic to various of the United States; coupon bonds issued by the United States, by foreign governments, by corporations domestic to various of the United States, and possibly by states (or subdivisions thereof) of the United States; and choses in action (like bank balances, etc.) owed by persons or corporations in the United States.

He left no tangible personal property which was physically located in the United States or its possessions. (b) He left real estate (or interests therein) located in the United States, the value of which at date of death, was returned by the Executor and determined by the Bureau, at $2501.00.

His will appointed said Liberty Central Trust Company Executor as to his American estate. Said Liberty Central Trust Company probated, in the Probate Court, City of St. Louis, an authenticated copy of said will, and, pursuant to the laws of Missouri, thereupon duly received letters testamentary and took charge of, and administered said American estate under the jurisdiction of said Probate Court. The will appointed "La Société de Banque Swiss" (Swiss Bank Corporation) Branch of Lausanne, located at Lausanne, Switzerland, Executor as to all his estate except that in America. This Swiss Bank Corporation took charge as domiciliary Executor, and administered the foreign estate under the jurisdiction of the "Court of Peace (Authority of Successions) of the Cercle of Montreux." The American administration was and is ancillary to that in Switzerland. The foreign estate included both tangible and intangible personal prop-
19 erty, the value of which will be stated hereafter.

In due course said Liberty Central Trust Company as Executor, made final distribution of the residue of the estate to itself as trustee of the trust created by said will, and was

discharged as Executor. Thereafter, the "St. Louis Union Trust Company," a Trust Company organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Company as trustee of said trust, and took over the said trust estate. Consequently, the St. Louis Union Trust Company, as sole distributee of the residue of said probated estate is the legal successor in title and liability to said "Liberty Central Trust Company," Executor, and said trust estate in the hands of said St. Louis Union Trust Company as trustee, will have to pay any additional estate tax that may be assessed and therefore is one of the Petitioners herein.

The "Mercantile Commerce Bank and Trust Company," of St. Louis, Missouri, is successor trustee to "Mercantile Trust Company" of the trust created by Trust Indenture made by said William J. Orthwein, dated January 1, 1930, and it joins in this appeal because the Commissioner seeks to include within the estate of William J. Orthwein the assets that constituted the corpus of said last named trust estate.

(B) Amount, Etc., of Alleged Deficiency. The amount of the alleged deficiency as stated in the Sixty-day letter of the Commissioner (copy attached,) is Fifteen Thousand Five Hundred Sixty-five Dollars Eighteen Cents ($15,565.18), and the nature of the tax is a Federal Estate Tax. Petitioners are unable to state the exact amount of tax in controversy, but it will be such amount as rests upon the determination of the respective assignments of error herein set out.

(C) Assignments of Error.

(1) Since the filing of the original petition herein, a fundamental question of jurisdiction has arisen because of certain recent decisions of the Supreme Court of the United States, cited and culminating in its decision January 4, 1932, in the case of First National Bank of Boston vs. State of Maine, 76 Law Ed. (No. 5 Adv. Sheets, 1931 Term) p. 211.

Under the law as settled by these decisions the legal situs of intangible personal property, for the purpose of death transfer (estate) taxes, is at the residence or domicile of the decedent owner, not in any other jurisdiction where the evidences of ownership of such property may be located at the time of his death.

In the instant case, all of the property heretofore assumed by Petitioners and by Respondent to constitute "the American estate" of this decedent, except the above mentioned real estate items valued at $2501.00, consisted of intangible personal property, which under the above decision had its legal

situs for the purpose of the estate tax, in Switzerland where the decedent had his residence (domicile) at his death.

Therefore, said intangible property was not within the jurisdiction of the United States, which had no power through the Congress to levy an estate tax in respect of its transfer, and the attempt of Respondent to impose such a tax is in contravention of Amendment V to the Constitution of the United States.

21 The Respondent therefore erred in attempting to impose a tax in respect of any of said "American estate" except said real estate.

Whether the Board of Tax Appeals does or does not sustain this Assignment (1), the following Assignments of Error are urged, the nature and amounts being changed as compared with those stated in the original petition herein, to conform to all of the evidence now on hand, including the substantial additional facts shown by the voluminous documents received from Switzerland since the sixty day letter was issued.

(2) Under the title "Transfers", the Commissioner erroneously treats as part of the estate, what is described in the statement attached to the notice of deficiency as "Remainder Value of Property Transferred in Trust $34,544.06".

This item covers the above mentioned trust estate created by Trust Indenture made by decedent January 1, 1920, whereby he transferred and delivered absolutely and irrevocably to the Mercantile Trust Company, as trustee, the assets in the above amounts that are now erroneously sought by the Commissioner to be treated as assets of decedent at the time of his death. All of the assets of said trust estate consisted at the date of decedent's death, of intangible personal property.

Said conclusion of the Commissioner is contrary to the expressed provision of Article XI, Regulations 68, and is contrary to the facts and to the law under the facts. The remainder of said assets may not validly be included in the estate of decedent.

22 (3) The Commissioner erred in respect of the item entitled "Jointly Owned Property, Items 1 to 5 inclusive," returned at Forty-one Thousand Nine Hundred Fifty-six Dollars Twenty-five Cents ($41,956.25), determined at Eighty-four Thousand Three Hundred Fifty Dollars ($84,350.00) as shown in said notice of deficiency, in treating Item 1 thereof as taxable at all.

The evidence now at hand shows that Item 1 of "Jointly Owned Property," being three hundred shares of stock in Gillette Safety Razor Company, a corporation organized in the United States, returned at $25,462.50, belonged to decedent's daughter, and, therefore, said amount should be deducted from the item representing the gross estate in the United States.

Petitioners withdraw their original assignments of error as to Items 2-5 inclusive of "Jointly Owned Property" as set out in their original assignment of errors, and limit this assignment to the error of Respondent in treating said three hundred shares of "Gillette" stock as a part of the estate.

(4) The gross estate of decedent, outside of the United States, had a total value at the date of decedent's death, of $277,635.59; and the Respondent erred in not so finding.

(5) The Executors have expended the following amounts on account of administration expenses and claims against the estate, a percentage of all of which items, not to exceed ten per cent of the value of the gross American Estate, should be deducted from said gross estate in determining the net American Estate, to-wit:

23	(A)	Funeral Expenses,	$ 11,375.22
	(B)	Executors' Commissions,	23,308.66
	(C)	Attorneys' Fees,	7,500.00
	(D)	Miscellanous Administration Expenses,	1,007.40
	(E)	Debts,	76,637.98
	(F)	Taxes,	21,531.84
		Total,	$141,361.10

The Respondent erred in not making said deduction.

(6) The estate has paid State inheritance taxes amounting to $6793.03, and is entitled to a credit against the Federal Estate Tax in the amount thereof but not to exceed twenty-five per cent of the estate tax.

The Respondent erred in not allowing such credit.

(7) The gross estate heretofore considered as within the United States (also herein called the "American Estate"), had a value at decedent's death, of $612,815.29.

This does not include:

The value of said 300 shares of stock in Gillette Razor Co., found to be the property of decedent's daughter,	$25,462.50
The remainder value of said assets transferred in trust, the propriety of including which is herein disputed by Petitioners,	34,544.06
Total of said two excluded items,	$60,006.56

The Respondent erred in not so finding.

(Explanatory note: It should be stated in connection with the foregoing assignments of error, that at the time of said sixty-day Bureau letter, many of the facts necessary to have enabled the Respondent to make correct findings in relation to most of said items, were not before him, having been learned later by Petitioners after the date of said letter, through their later experience and investigations in relation to the foreign (domiciliary) estate and records).

24 (D) The Facts.

Assignment No. (1). Decedent died in Territet, Switzerland, September 4, 1925. He was a citizen of the United States, but had established and then had his residence and domicile at Territet, in Switzerland.

He left a substantial estate that has heretofore been designated the "American Estate" consisting of the classes of property heretofore mentioned in Subdivision (A) hereof, under the title "Jurisdiction", to which reference is hereby made. He left no tangible personal property which was physically located in the United States, or its possessions. He left real estate, or interests therein, located in the United States, the value of which at the date of death was returned by the Executors and determined by the Bureau at $2501.00.

He also left a foreign estate which included both tangible and intangible personal property, the gross value of which as above stated, was $277,635.59. The foreign estate included stocks in various foreign corporations, also various bonds and other choses in action.

In dealing with the estate, the Respondent and the Executors have heretofore proceeded on the mistaken assumption that for the purpose of the estate tax, the legal situs of all shares of stock in corporations organized in any of the states of the United States, and of all bonds physically located in the United States, and of other choses in action, like bank credit balances, etc. owed by debtors in the United
25 States, was within the United States, and, therefore, subject to the jurisdiction of Congress, and to the Estate Tax Act.

Petitioners hereby refer to the other facts relating to this point stated elsewhere in this amended petition.

The foreign estate paid a substantial succession tax (209,202 Swiss francs) to the Swiss Governmental taxing authorities.

Recent decisions of the Supreme Court of the United States above mentioned show that said assumption was incorrect in fact and law.

The Petitioners, therefore, respectfully contend, that the doctrines theretofore generally understood to obtain in the United States in respect of the legal situs for the purpose of succession and other taxes, of intangible personal property, have been completely overthrown by the decisions of the Supreme Court of the United States in the case of First National Bank of Boston vs. State of Maine, 76 Law Ed. (No. 5. Adv. Sheets, 1931 Term) p. 211, and in the other cases therein cited.

Petitioners respectfully contend that this new doctrine having thus become the established law of the United States, it follows that all of the intangible personal property heretofore erroneously assumed by Petitioners and by Respondent to constitute the "American Estate" of this decedent had its legal situs for the purpose of estate taxes, in Switzerland where the decedent had his residence and domicile at the date of his death; that said intangible personal property was not within the jurisdiction of the United States, which had no
26 power through Congress to levy an estate tax in respect of its succession or transfer, and that the attempt of Respondent to impose such a tax is in contravention of Amendment V to the Constitution of the United States, as an attempt by the United States to deprive the owners thereof, of property, without due process of law.

Assignment No. (2). The Transfer referred to in this assignment of error, consisted of a Trust Indenture made by

decedent January 1, 1930, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, then aggregating in their principal face amount $118,000.00 and having a value at the date of decedent's death, of $101,421.24. This transfer was in trust to hold, manage and dispose of as an active trust, to pay the net income thereof to his daughter Alma Feraldo, during her life. She was born February 1, 1891. The Indenture shows conclusively that the trust settlement thereby made, and the trust estate transferred, were made and transferred absolutely and irrevocably. The Trust Indenture expressly declared the intent of the grantor (decedent) to make "an absolute and irrevocable gift and settlement of the property hereinafter described, so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein." The grantor retained no power of revocation or alteration. He could do nothing to revoke or alter the fact that he had parted completely and irrevocably with the assets that constituted the trust estate. The only possible interest retained by him was a mere contingent remainder, the vesting of which depended upon the happening of contingencies over which he had absolutely no control, namely, the death of his daughter before his death, plus the then existence of
27 the trust.

The trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived. These facts destroyed the possibility of any remainder ever vesting in the grantor, said William J. Orthwein. It follows that at his death he had no taxable interest in this trust estate.

The attempted inclusion by the Commissioner of $34,344.96 as representing the remainder value of the trust estate at the time of decedent's death is contrary to the law and to Art. II, Regulation 78, then in force.

(3) Jointly Owned Property: Assignment No. (3).

The 300 shares of stock in Gillette Safety Razor Company that alone are now covered by this assignment, were represented at the date of decedent's death by a stock certificate issued in the name of decedent's daughter Alma Feraldo, which stock certificate was on deposit in her name, with the Swiss bank ("Societe de Banque Swisse.") Neither this certificate nor its deposit had any relation to the estate of decedent. It was the individual property of said Alma Feraldo.

The Estate Tax Return was filed by the American Executor before it knew the actual facts and was based upon mistaken information as to this item of Gillette stock, also as to four additional items (2 to 5 inclusive) of stock in other American corporations, which items were also returned under the title "Jointly Owned Property."

The facts as to these other four items (2 to 5), consisting of 500 shares in Armour Company, A stock; 500 shares in Armour Company, B stock; 500 shares in Gimbel Bros. and 100 shares in U. S. Steel Co., common, are merely that as assets of decedent, they should have been included in the
American Estate being stocks in corporations in
28 states of the United States.

Assignment No. (4). The facts so far as relevant in support of this assignment have already been stated in Assignment (4), to which reference is here made.

Assignment No. (5). The facts as to the nature and amounts of payments made by the estate for administration expenses and for claims against (debts of) the estate have already been stated in Assignment (5), to which reference is hereby made.

Assignment No. (6). A similar situation obtains as to the facts relevant to Assignments (6) and (7). In each instance reference is hereby made to the facts then stated.

Prayer for Relief.

Petitioners respectfully pray: that the above respective Assignments of Error be sustained; that the respective amounts alleged in said Assignments to have been erroneously included within said estate be excluded therefrom; that said respective amounts, as to which the Respondent is above alleged to have erred in not allowing them as deductions, be allowed as deductions; that said respective amounts, as to which it is above alleged that the Respondent erred in not allowing them as credits, be allowed as credits; and that the tax be redetermined in accordance with the decision of the Board upon said various Assignments of Error, and that judgment be entered accordingly.

ST. LOUIS UNION TRUST COMPANY,
By H. J. Miller, Trust Officer.

MERCANTILE-COMMERCE BANK & TRUST COMPANY,
By Thos. C. Hennings, Vice Pres.

Daniel N. Kirby,
Address, Room 918 Security Bldg.,
St. Louis, Missouri.
Counsel for St. Louis Union Trust Company.

29 Joseph W. White,
Address, 411 North Seventh St.,
St. Louis, Missouri.
Counsel for Mercantile-Commerce
Bank & Trust Company.

State of Missouri,
City of St. Louis—ss.

H. J. Miller, of lawful age, being duly sworn upon oath, states that he is Trust Officer of St. Louis Union Trust Company, was Trust Officer of Liberty Central Trust Company, and has had personal charge for said trust companies of all of the administrations, (both probate and trust administration), upon the estate of William J. Orthwein, of which said trust companies, or either of them, have at any time had charge. That he is personally familiar with all of the facts relating to the American administration of the will of William J. Orthwein, the decedent named in the foregoing petition, and has also conducted the correspondence that has been conducted by said trust companies, or either of them, with the Swiss executor of said will; and that the facts stated in the foregoing petition are true to the best of affiant's knowledge, information and belief.

H. J. MILLER.

Subscribed and sworn to before me this 3rd day of August, 1932.

My Commission expires June 3, 1934.

ALLAN DUNBAR,
Notary Public.

(Notarial Seal)

State of Missouri,
City of St. Louis—ss.

30 Thos. C. Hennings, of lawful age, being duly sworn upon oath, says that he is Vice President of the Mercantile-Commerce Bank & Trust Company, of St. Louis, Missouri, which company joins as a petitioner in the foregoing petition because it has had charge since the creation thereof, of the trust estate created by William J. Orthwein, the within named decedent, by his Trust Indenture therein mentioned as dated January 1, 1920; that affiant has

personal knowledge of the creation of said trust and of the administration of said trust estate by the Mercantile Trust Company and by the Mercantile-Commerce Bank & Trust Company, its successor trustee.

That the facts stated in the foregoing petition in relation to said trust and trust estate are true to the best of affiant's knowledge, information and belief.

THOS. C. HENNINGS.

Subscribed and sworn to before me this 4th day of August, 1932.

My commission expires Jan. 6, 1935.

NELLIE GROGAN,
Notary Public.

(Notarial Seal)

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31 (Copy of Deficiency Letter)

Treasury Department

Washington

Office of
Commissioner of Internal Revenue

Dec. 27, 1929.

MT-ET-Cl. NR-14321-JEK
District of 1st Missouri
Estate of William J. Orthwein
Date of death—September 4, 1925.

St. Louis Union Trust Company, Executor,
Estate of William J. Orthwein,
St. Louis, Missouri.

Sirs:

The Bureau has examined the protest filed on behalf of the above named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of November 11, 1929. The deficiency in Federal estate tax hereby determined amounts to $15,565.18, and is fully explained in the attached statement, consisting of pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed sixty days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60 day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and to forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

(Signed) H. F. MIRES,
Acting Commissioner.

Enclosures:
Statement,
Waiver—Form 890

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32 MT-ET-Cl-Nr-14321-JEK-1st Missouri
Estate of William J. Orthwein

The estate's protest arises in connection with the following items.

Gross Estate

Stocks and Bonds	Returned	Tentatively Determined	Determined
20 shares Ely U. Walker Dry Goods Company, 1st preferred	$ 0.00	$ 2,120.00	$ 0.00
27 shares National Lead Company, preferred	0.00	3,121.88	0.00
Dividend thereon	0.00	47.25	0.00

Jointly Owned Property			
Items 1 to 5, inclusive	41,956.25	84,350.00	84,350.00
Transfers			
Remainder value of property transferred in trust	0.00	34,544.06	34,544.06
Deductions			
Total claimed	41,122.58	0.00	0.00

It has been established by evidence presented in connection with the estate's protest that decedent was not the owner of the securities described above under "Stocks and Bonds". The value tentatively included for tax has been eliminated in this adjustment.

Nothing has been presented which warrants the Bureau in changing its action in taxing the full value of the property described in the return under Items 1 to 5, inclusive of "Jointly Owned Property" nor with respect to the inclusion for tax of the remainder value of the property transferred in trust by decedent prior to his death.

In the tentative audit no deductions whatever were allowed, as the estate failed to comply with the requirements of Article 52, Regulations 70. As nothing has been submitted which warrants any change in that action, no adjustment is herein made.

As the requirements of Article 9, Regulations 70, relative to credit for State inheritance taxes has been complied with as respects the taxes paid to the State of Missouri, credit in the amount paid has herein been allowed.

The following computation shows the estate tax liability of the estate, which is hereby made final:

33

	Returned	Tentatively Determined	Determined
	$	$	$
Gross estate	411,225.82	678,110.98	672,821.85
Deductions	41,122.58	0.00	0.00
Net estate	370,103.24	678,110.98	672,821.85
Tax liability	11,304.13	27,186.66	26,869.31
Deficiency		15,882.53	15,565.18

Tax liability	$26,869.31
Credit for State inheritance taxes paid	6,009.85
Tax less credit	20,859.46
Returned tax less allowable credit	8,478.10
Amount proposed for assessment	$12,381.36

The amount proposed for assessment will bear interest at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

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34 (Answer of Commissioner of Internal Revenue to Amended Petition for Appeal.)

Filed Oct. 5, 1932, United States Board of Tax Appeals.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the amended petition of the above-named taxpayer, admits and denies as follows:

(A) Denies so much of the paragraph of the amended petition lettered (A) as alleges that the decedent left no tangible personal property which was physically located in the United States or its possessions; that the American administration was and is ancillary to that in Switzerland; and admits all other allegations contained in said paragraph of the amended petition lettered (A).

(B) Admits the allegations contained in the paragraph of the amended petition lettered (B).

(C) (1) and (2) Denies the allegations contained in subdivisions (1) and (2) of the paragraph of the amended petition lettered (C).

35 (C) (3), (4), (5), (6) and (7). Admits the allegations contained in subdivisions (3) to (7), inclusive, of the paragraph of the amended petition lettered (C).

(D) Assignment No. (1). Admits so much of the subdivision designated "Assignment No. (1)" under the paragraph of the amended petition lettered (D), as alleges that decedent died in Territet, Switzerland, September 4, 1925; that he was a citizen of the United States, but had established and then had his residence and domicile at Territet, in Switzerland; that he left a substantial estate that has heretofore been designated the "American Estate"; that he left real estate in the United States, the value of which, at the date of death, was returned by the executors and determined by the Bureau at $2,501.00; that he also left a foreign estate which included both tangible and intangible personal property, the gross value of which, as above stated, was $277,635.59, and denies all other allegations contained in said subdivision designated "Assignment No. (1)", under the paragraph of the amended petition lettered (D).

(D) Assignment No. (2). Admits so much of the subdivision designated "Assignment No. (2)", under the paragraph of the amended petition lettered (D), as alleges that the transfer referred to in this assignment of error, consisted of a Trust Indenture made by the decedent January 1, 1930, whereby he transferred, assigned and delivered to Mercantile Trust Company of St. Louis, in trust, certain bonds therein described, then aggregating in their principal face amount $118,000.00, and having a value at the date of decedent's
36 death of $101,421.24; that Alma Feraldo was born February 1, 1891; that the trust was in existence at the date of testator's death, September 4, 1925, and his daughter then survived, and denies all other allegations contained in said subdivision designated "Assignment No. (2)", under the paragraph of the amended petition lettered (D).

(D) (3) to (6). Admits the allegations contained in subdivisions designated Assignment No. (3) to (6), inclusive, of the paragraph of the amended petition lettered (D).

(E) Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved.

(Signed) C. M. CHAREST,
General Counsel, Bureau
of Internal Revenue.

Of Counsel:
Frank T. Horner,
Special Attorney,
Bureau of Internal Revenue.
RFS/y 10/4/32

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37 (Opinion of United States Board of Tax Appeals.)

United States Board of Tax Appeals.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; Joined by Mercantile Commerce Bank & Trust Comapny, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Petitioners,
Docket No. 47633. vs.
Commissioner of Internal Revenue, Respondent.

Promulgated May 16, 1933.

1. The decedent, who died a nonresident of the United States on September 4, 1925, created a trust fund January 1, 1920, the income of which was to be paid to his daughter for life, with remainder over. The instrument provided that if the daughter died prior to the decedent the principal of the fund should be paid to him. Held, the value of the remainder interest was not includable in decedent's gross estate.

2. At the date of his death the decedent owned property located in the United States consisting of shares of stock, bonds, etc., the symbolical evidences of which were located in the United States. Held, the value of such property constituted part of the decedent's gross estate.

Daniel N. Kirby, Esq., for the petitioners.

Ralph F. Staubly, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in estate tax of $15,565.18. The deficiency was determined against the American estate of William J. Orthwein, who died a nonresident of the United States.

Certain issues raised by the pleadings respecting the taxability of jointly owned property, the allowance of deductions on account of administration expenses and debts of the decedent, and the allowance or credit on account of inheritance taxes paid, have been disposed of by a stipulation of facts filed. The issues presented for the determination of the Board are:

(1) Where the decedent, a nonresident, places property in trust with a domestic corporate trustee, consisting of shares of stock in domestic corporations and foreign and domestic bonds, to pay the income to his daughter for life, the
38 remainder to be distributed according to the provisions of the trust instrument but in the event of the daughter predeceasing the decedent the property to revert to the grantor, is the value of the property in excess of the value of the life estate of the daughter subject to be included in the decedent's gross estate pursuant to the provisions of section 302 (c) of the Revenue Act of 1924?

(2) Should the value of (a) shares of stock in domestic corporations, (b) domestic bonds, and (c) foreign bonds, the symbolical evidences of which were physically located in the United States at the date of the decedent's death, be included in the gross estate of the nonresident decedent pursuant to the provisions of section 302 (a) of the Revenue Act of 1924?

Findings of Fact.

The decedent, William J. Orthwein, a citizen of the United States, died in Switzerland, September 4, 1925, then a resident of, and domiciled in, Switzerland.

The decedent left a will dated and executed at Territet, Switzerland, November 28, 1923, by which he appointed the Liberty Central Trust Co. of St. Louis, Missouri, executor of his American estate, i. e., "All that relates to my American Affairs," and "La Societe de Banque Swisse" (Swiss Bank Corporation), branch of Lausanne, executor of the rest of his estate wherever situated.

The Swiss Bank Corporation, as such foreign executor, took charge of and administered the estate outside of the United States.

The American administration was conducted in the Probate Court, City of St. Louis, Missouri, where an authenticated copy of the will was filed and Liberty Central Trust Co. was appointed executor d. b. n. on March 16, 1926.

The Liberty Central Trust Co. as executor, made final distribution of the residue of the estate to itself as trustee of the trust created by the will and was discharged as executor. Thereafter the St. Louis Union Trust Co., a trust company organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Co. as trustee of the trust and took over the trust estate. Consequently, the St. Louis Union Trust Co., as sole distributee of the residue of said probated estate, is the legal successor in title and liability to the Liberty Central Trust Co., executor, and said trust estate in the hands of said St. Louis Union Trust Co. as trustee will have to pay any additional estate tax that may be assessed, and therefore is one of the petitioners herein.

The Mercantile Commerce Bank & Trust Co. of St. Louis, is successor trustee to Mercantile Trust Co. of the trust created by trust indenture made by William J. Orthwein,
39 the decedent, dated January 1, 1920, and it joins in this proceeding because the respondent seeks to include within the estate of William J. Orthwein the assets that constituted the corpus of the last named trust estate.

The decedent left a substantial estate, hereinafter referred to as the American estate, consisting of:

(a) Personal property (choses in action, stocks and bonds), a substantial part of which was evidenced by: stock certificates located in the United States (chiefly in St. Louis,

Missouri), evidencing shares of stock in corporations domestic to various of the United States; coupon bonds that were physically located in the United States, issued by the United States, by foreign governments, by corporations, public and private, which are domestic to various of the United States; and choses in action (like bank balances, etc.) owed by persons or corporations located in the United States.

As to the securities held by the Liberty Central Trust Co.: When decedent, having retired from business, moved his place of residence to Switzerland, he turned over these securities to the German Savings Institution (predecessor of the Liberty Central Trust Co.) with which he then and thereafter (until his death) conducted a deposit account. He gave no power of attorney to the bank, but told its officer with whom he made the arrangement that he had instructed or would instruct the corporations which had issued the shares of stock thus turned over and which stood in his name, to mail to the bank the dividend checks thereon, which would be payable to him, so that the bank might deposit such checks, together with the interest coupons on the bonds that were also turned over, to the credit of decedent's deposit account with the bank. Pursuant to this arrangement, the bank received the income from these securities and credited it, together with other deposits made by the decedent, to him on his deposit account with the bank. The bank neither had nor exercised any power of control, sale or management over these securities. They were held subject to the order of decedent. The same situation or relation existed between the Trust Co. and decedent, except that a year or so before decedent's death he borrowed money from the Trust Co., which was credited to his deposit account, and he gave the Trust Co. either his collateral note or its equivalent which gave the Trust Co. a lien on the securities for the payment of this debt. At decedent's death the unpaid principal of this debt was about $16,000.

The personal property thus in the keeping of the Trust Co. consisted of the items of stocks and bonds in schedule (b) of the Federal estate tax return.

As to the securities held in New York City, these stock certificates and bonds never came into the possession of the American executor, although it endeavored to obtain them. They were held in New York until under the control of the Swiss Bank Corporation at the date of decedent's death. Accordingly they were not included in the Trust Co.'s inventory or estate tax return, except five items of stocks in American corporations which were included in the

estate tax return as "jointly owned property" and treated in the deficiency notice attached to the amended petition at their full (not their one-half) value.

They were inventoried and otherwise treated by the foreign executor as among the assets held by it and as "in New York."

The above securities, physically located in New York City, in the custody of a New York banking house at decedent's death, have not heretofore, for the purpose of administration, been treated as part of the American estate.

(b) Real estate (or interests therein), located in the United States, the reasonable, fair value of which at the date of death was $2,501, the amount at which it was returned by the executor and determined by the respondent.

The gross foreign estate of the decedent (outside of the United States) included both tangible and intangible personal property having a total value at the date of decedent's death of $277,635.59.

On January 1, 1920, by his trust indenture, the decedent transferred various securities to the Mercantile Trust Co. of St. Louis, in trust to hold, manage, and dispose of as an active trust and to pay the net income thereof to the decedent's daughter, Alma Feraldo, during her life and upon her death for disposition as provided in the trust indenture.

The trust indenture contained a provision that if the daughter predeceased the grantor the trust should terminate and the trust estate should be paid over to the grantor, if living. The trustee of the trust was given discretionary power to terminate the trust deed "at such time as the trustee may deem it wise that the trust be terminated."

The daughter was born February 1, 1891. She did not predecease the decedent but survived him and the trust is still alive. The value of the trust securities at the date of the decedent's death, including accrued income thereon, was $101,421.24 and an agreed value at decedent's death of the reversionary interest in the trust corpus subject to the daughter's life estate is $34,544.06. The respondent in determining the deficiency claimed included said reversionary interest in the gross estate at a value of $34,544.06.

The gross estate heretofore considered as within the United States had a value at date of decedent's death of $612,815.29. This is exclusive of $25,462.50, the value of 300 shares of stock

in Gillette Razor Co. included in the gross estate by the
41 respondent but later found to be the property of decedent's daughter, and also of the remainder value of the trust estate of $34,544.06.

Opinion.

Smith: The first question for the determination of the Board is the propriety of including in the gross estate the value of the reversionary interest of the decedent in the trust estate. There is no contention on the part of the respondent that the value of this reversionary interest of $34,544.06 should be included in the gross estate upon the ground that the trust was created in contemplation of death. It is contended, however, that the amount should be included in the gross estate under section 302 of the Revenue Act of 1924, which, so far as pertinent, reads as follows:

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a tranfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title.

The trust indenture expressly declared the intention of the decedent grantor to make "an absolute and irrevocable gift and a settlement of the property hereinafter described, so that the grantor shall, during the life of his said daughter, have no further individual or beneficial interest therein." The grantor retained unto himself no power of revocation or

alteration. The only power to end the trust during the life of the grantor rested in the trustee alone. The decedent could do nothing to alter the fact that he had parted irrevocably with the trust estate. The only possibility of his ever reacquiring an interest in the trust property depended upon the happening of certain contingencies which in fact never happened; viz., (1) a termination of the trust by the trustee during decedent's life; or (2) the death of his daughter, the life tenant, before his death plus the then existence of the trust.

42 His daughter survived him and the trust is still alive, so the contingencies upon which he might have reacquired the property never happened. At his death, his daughter still being alive, the decedent "had no further individual or beneficial interest" in the trust estate which would or could pass by his death.

The power of termination given to the trustee alone did not render the remainder subject to the tax. The decedent of his own volition had no power to terminate the trust and the power of the trustee gave him no control over the termination thereof. White vs. Erskine, 47 Fed. (2d) 1014; McCormick vs. Burnet, 283 U. S. 784; Lillian M. Wheeler, Executrix, 20 B. T. A. 695; Colonial Trust Co. et al., Executors, 22 B. T. A. 1377.

The provision of the trust instrument that upon the prior death of the daughter, the life tenant, the trust estate should revert to the grantor, the decedent herein, did not render the value of the reversionary interest a part of the decedent's gross estate. The situation here is parallel to that which obtained in May vs. Heiner, 281 U. S. 238, in which the court said:

The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.

To the same effect is Cyrus H. McCormick et al., Executors, 13 B. T. A. 423; affd., McCormick vs. Burnet, 283 U. S. 784; Nanaline H. Duke et al., Executors, 23 B. T. A. 1104; affd., C. C. A., 3d Cir., Jan. 10, 1933. Cf. H. Seldon Taylor, Jr., et al., Executors, 27 B. T. A. 220; Elizabeth B. Wallace, Ex-

ecutrix, 27 B. T. A.—. The contention of the petitioners upon this point is sustained.

The second point for determination of the Board is the inclusion in the gross estate of the value of bonds, certificates for shares of stock, etc., physically located in the United States but belonging at the date of death of the decedent to a nonresident alien. The contention of the petitioners upon this point is not sustained. The decision of the Supreme Court in Burnet vs. Brooks,—U. S.—, decided March 13, 1933, is dispositive of this issue.

Reviewed by the Board.

Judgment will be entered under Rule 50.

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43 (Order of Redetermination, December 16, 1933.)

United States Board of Tax Appeals.

Washington.

St. Louis Union Trust Company, as Successor to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; Joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Petitioners,

Docket No. 47633. vs.

Commissioner of Internal Revenue, Respondent.

Pursuant to the findings of fact and opinion of the Board in the above-entitled proceeding promulgated May 16, 1933, the respondent, on November 25, 1933, filed a notice of proposed redetermination. Hearing was had thereon on December 13, 1933, at which time there was no appearance for the petitioner and the proposed redetermination of the respondent was uncontested. Wherefore, it is—

Ordered and Decided that there is no deficiency in estate tax due from the petitioner.

CHARLES P. SMITH,
Member.

Enter:
Entered
Dec. 16, 1933.

(Seal)
C.P.S.:aa.

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44 (Petition of Guy T. Helvering, Commissioner, for Review of Decision of United States Board of Tax Appeals.)

Filed March 3, 1934, U. S. Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Eighth Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

B. T. A. Docket No. 47633. vs.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust created by Trust Indenture of William J. Orthwein, dated January 1, 1920, Respondents.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and Frank T. Horner and Ralph P. Staubly, Special Attorneys, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that the St. Louis Union Trust Company of St. Louis, Missouri, is the successor to the Liberty Central Trust Company, testamentary trustee under the last Will and Testament of the decedent, William J. Orthwein; that the Liberty Central Trust Company was named as executor under the Will of the decedent, qualified as such, and thereafter distributed the residuary estate to itself as testamentary trustee, whereupon it was discharged as executor of the decedent's Will; that the Mercantile Commerce Bank & Trust Company of St. Louis, Missouri, successor to the Mercantile Trust Company, is trustee under the trust indenture executed by the decedent under date of January 1, 1920; that the decedent, William J. Orthwein, died a resident of Switzerland, on September 4, 1925; that the estate tax return made on behalf of the dece-

45

dent's estate was filed with the Collector of Internal Revenue for the 1st District of Missouri, whose office is located in St. Louis, Missouri, which is within the jurisdiction of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

That the Court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Eighth Circuit.

II.

The nature of the controversy is as follows, to-wit:

The decedent, William J. Orthwein, died September 4, 1925, a resident of Switzerland; thereafter the residuary estate of the decedent was transferred to the St. Louis Union Trust Company as trustee of the testamentary trust created under the provisions of the decedent's will, and is now acting in such fiduciary capacity; that the Mercantile Commerce Bank & Trust Company is the successor to the Mercantile
46 Trust Company, trustee under the trust indenture executed by the decedent on January 1, 1920, and is now acting in such fiduciary capacity; the estate tax return filed on behalf of the decedent's estate disclosed a tax liability of $8,478.10.

In making the return on behalf of the decedent's estate, for Federal estate tax purposes, the executor of the decedent's will did not include any part of the corpus of the trust of January 1, 1920, in the decedent's gross estate.

Under date of December 27, 1929, the Commissioner of Internal Revenue sent a notice to the St. Louis Union Trust Company, of St. Louis, Missouri, as executor, asserting a deficiency in the estate tax upon the transfer of the net estate of the decedent in the amount of $15,565.18. In determining the deficiency in the estate tax, the Commissioner included in the decedent's gross estate the value of the reversionary interest of the decedent in the corpus of the said trust of January 1, 1920, pursuant to the provisions of Section 302 (c) of the Revenue Act of 1924, as the subject of a transfer made by the decedent which was intended to take effect in possession or enjoyment at or after the decedent's death, to the extent of such reversionary interest.

Under date of February 24, 1930, the St. Louis Union Trust Company, as successor to the Liberty Central Trust Company, as testamentary trustee of the decedent's residuary estate, which said company was the former executor of the

decedent's Will, together with the Mercantile Commerce Bank & Trust Company, successor trustee under the trust executed by the decedent on January 1, 1920, filed a petition with the United States Board of Tax Appeals for a redeter-
47 mination of the estate tax deficiency above-mentioned. After the answer of the Commissioner was duly filed, the case was submitted to the Board of Tax Appeals for decision on the basis of the pleadings and written stipulations of fact.

All issues raised by the pleadings, other than the taxability of the corpus of the trust of January 1, 1920, to the extent of the decedent's reversionary interest therein, were disposed of by said stipulations above-mentioned. Subsequent to the filing of the appeal, and as the result of the adjustments stipulated, the estate made a payment on account of the tax, of $6,215.92, leaving an unpaid balance on account of the deficiency of $2,072.64, the amount of the tax attributable to the inclusion in the gross estate of the reversionary interest in the corpus of the said trust of January 1, 1920, as aforesaid.

The opinion and interlocutory decision of the Board was promulgated May 16, 1933, and the final order of the Board, redetermining the deficiency, was entered December 16, 1933, in which it was ordered and decided that there is no deficiency in the estate tax. The Board of Tax Appeals, in redetermining that there is no deficiency in the estate tax, held and decided that the transfer made by the decedent, of the reversionary interest in the corpus of the trust of January 1, 1920, was not intended to take effect in possession or enjoyment at or after the decedent's death.

48 III.

The said Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in said decision, and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Eighth Circuit.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the Commissioner erred in including in the decedent's gross estate, for the purpose of the Federal estate tax, the value of the decedent's reversionary interest in the corpus of the trust executed by him on January 1, 1920.

2. The Board of Tax Appeals erred in failing and refusing to hold and decide that the value of the decedent's re-

versionary interest in the corpus of the trust executed by the decedent on January 1, 1920, was subject to be included in the decedent's gross estate, for the purpose of the estate tax, pursuant to the provisions of Section 302 (c) of the Revenue Act of 1924, as a transfer intended to take effect in possession or enjoyment at or after his death.

3. The Board of Tax Appeals erred in entering its final order of redetermination that there is no deficiency in the estate tax, instead of a deficiency in the tax as would
49 result from the inclusion in the decedent's gross estate of the reversionary interest of the decedent in the corpus of the trust executed by him on January 1, 1920.

4. The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is a deficiency in the estate tax in the amount of the tax which would result from the inclusion in the decedent's gross estate of his reversionary interest, as of the date of his death, in the corpus of the trust executed by him on January 1, 1920, instead of entering its final order of redetermination that there is no deficiency in the estate tax.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit; that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

FRANK J. WIDEMAN,
Assistant Attorney General.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
Frank T. Horner,
Ralph F. Staubly,
Special Attorneys,
Bureau of Internal Revenue.

50 United States of America,
District of Columbia—ss.

Ralph F. Staubly, being duly sworn, says that he is a special attorney in the Office of the General Counsel of the Bureau of Internal Revenue, and as such, is duly authorized

to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.

Sworn and subscribed to before me this 2nd day of March, 1934.

(Sgd.) GEORGE W. KREIS,
Notary Public.

My Commission Expires Nov. 16, 1937.

RFS/y 2/28/34

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51 (Notice of Filing of Petition for Review and Acknowledgment of Service.)

Filed March 10, 1934, United States Board of Tax Appeals.

To:

St. Louis Union Trust Company,
Mercantile Commerce Bank & Trust Company,
St. Louis, Missouri,
Respondents.

Daniel N. Kirby, Esq.,
c/o Nagel, Kirby, Orrick & Shepley,
319 North Fourth Street,
St. Louis, Missouri,
Attorney for Respondents.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of March, 1934, file with the Clerk of the United States Board of Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

52 Dated this 2nd day of March, 1934.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of March, 1934.

ST. LOUIS UNION TRUST CO.,
By O. F. Miller, Trust Officer,
Respondent on Review.

MERCANTILE-COMMERCE BANK & TRUST COMPANY, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, dated January 1, 1920.
By: Joseph W. White, Trust Officer,
Respondent on Review.

DANIEL N. KIRBY,
Attorney for Respondent on Review.

y/3/1/34

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53 (Stipulation of Facts.)

Filed October 19, 1932, United States Board of Tax Appeals.

United States Board of Tax Appeals.

St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased; joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, dated January 1, 1920, Petitioners,
Docket No. 47633. vs.
Commissioner of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding, through their respective counsel, as follows:

1. That the decedent, William J. Orthwein, a citizen of the United States of America, died in Switzerland, September 4, 1925, then a resident of, and domiciled in, Switzerland, at Territet, Switzerland.

2. That decedent left a will dated and executed at Territet, Switzerland, on November 28, 1923, by which he appointed the

Liberty Central Trust Company of St. Louis, Missouri, executor of his American estate, i. e., "All that relates to my American affairs", and "La Societe de Banque Swisse" (Swiss Bank Corporation), branch of Lausanne, executor of the rest of his estate wherever situated. A copy of said will is attached hereto and made part hereof, marked Exhibit "A".

3. That the Swiss Bank Corporation as such foreign
54 executor, took charge of and administered the estate outside of the United States. The official acts incident to this foreign administration began on September 5, 1925, immediately following the death of decedent.

4. That the American administration was conducted in the Probate Court, City of St. Louis, Missouri, where an authenticated copy of the will was filed, and said Liberty Central Trust Company was appointed executor d. b. n. on March 16, 192[illegible].

5. That decedent left a substantial estate heretofore treated and hereinafter referred to as the "American estate", consisting of:

(a) Personal property (choses in action, stocks and bonds), a substantial part of which was evidenced by: stock certificates located in the United States (chiefly in St. Louis, Missouri), evidencing shares of stock in corporations domestic to various of the United States; coupon bonds that were physically located in the United States, issued by the United States, by foreign governments, by corporations, public and private, which are domestic to various of the United States; and choses in action (like bank balances, etc.) owed by persons or corporations located in the United States.

55 As to the securities held by the Liberty Central Trust Company: When decedent, having retired from business, moved his place of residence to Switzerland, he turned over these securities to the German Savings Institution (predecessor of the Liberty Central Trust Comapny) with which he then and thereafter (until his death) conducted a deposit account. He gave no power of attorney to the bank, but told its officer with whom he made the arrangement, that he had instructed or would instruct the corporations which had issued the shares of stock thus turned over and which stood in his name, to mail to the bank the dividend checks thereon, which would be payable to him, so that the bank might deposit such checks, together with the interest coupons on the bonds that were also turned over, to the credit of decedent's deposit account with the bank. Pursuant to this arrangement, the bank received the income from these securities and credited

it, together with other deposits made by decedent, to him on his deposit account with the bank. The bank neither had nor exercised any power of control, sale or management over these securities. They were held subject to the order of decedent. The same situation or relation existed between the trust company and decedent, except that a year or so before decedent's death, he borrowed money from the Trust Company, which was credited to his deposit account, and
56 he gave the Trust Company either his collateral note or its equivalent which gave the Trust Company a lien on the securities for the payment of this debt. At decedent's death, the unpaid principal of this debt was about $16,000.00.

The personal property thus in the keeping of the Trust Company, consisted of the items of stocks and bonds described in "Schedule B" of the Federal Estate Tax Return, which is hereby referred to and made part hereof.

As to the securities that decedent had transferred in January, 1920, to the Mercantile Trust Company, of St. Louis, by his Indenture of Trust of said date: A list of the securities then transferred will be found in the copy of said Indenture of Trust hereinafter described (Exhibit "B" hereto).

A list of the securities that constituted said trust estate at the date of the decedent's death, and the remainder value of which is stated elsewhere herein, follows:

$25,000.	United Rys. Co., St. Louis, 1st Gen. Mtg. 4's
$15,000.	Ill. Cen. Ry. Co. 4% col. Gold Bonds
$10,000.	Chi. Milwaukee & St. Paul Ry. Co. 4%
$ 9,000.	Granby Mining & Smelting Co., 1st Mtg. Bonds
$10,000.	Republic of Cuba External Loan of 1909
$ 4,000.	Harrison County, Tex. Spec. Rd. 5% Bonds
$25,000.	United Kingdom of Great Britain & Ireland 5½% Bonds
$ 1,000.	Block two Eighty-one Realty Co., 6% R. E. Notes
$ 3,000.	Dominion of Canada 5% 30 yr. Gold Bonds
$ 4,000.	Argentine Nation 5 yr. 7% Gold Bonds
57 6%	First Mtg. R. E. Notes
$ 4,000.	Christiana Norway Municipal External Loan of 1920 —25 yr. 8% Sinking Fund Gold Bonds
$ 500.	Republic of Chile External Loan—25 yr. 8% Sinking Fund Gold Bonds
$ 3,000.	Queensland, Australia 6% External Gold Bonds, 25 yr. Sinking Fund
10	Shares So. Pac. Co., Common
10	Shares Pac. Oil Company
$ 900.	Missouri Theater Co., 6% First Mtg. R. E. notes
$ 2,000.	Scruggs-Vandervoort-Barney Realty Co., Denver, Colo.
$ 1,000.	Garfield Memorial Hospital, Washington, D. C. 5½% R. E. Gold Notes

As to the securities held in New York City, these stock certificates and bonds never came into the possession of the American executor although it endeavored to obtain them. They were held in New York under the control of the Swiss Bank at the date of decedent's death. Accordingly they were not included in the Trust Company's inventory or Estate Tax Return, except to the extent noted later.

They were inventoried and otherwise treated by the foreign executor as among the assets held by it and as "In New York", and they included the following items at inventoried values as shown by the Swiss inventory:

Stocks:			
300	Shares, Gillette Razor Co., valued at $90.00, or (Exch. 5.17),	139,590	Swiss francs
	(These are mentioned later herein, as having been found to belong to decedent's daughter, Alma Feraldo).		
500	Shares, Armour & Co., Ill., "A" stock, valued at $22.50, or (Exch. 5.17)	58,162.50	Swiss francs
58 500	Shares, Armour & Co., Ill. "B" stock, valued at $13.00, or (Exch. 5.17),	33,605.	Swiss francs
500	Shares, Gimbel Bros., Common, valued at $55.50, or (Exch. 5.17),	143,467.50	Swiss francs
100	Shares, U. S. Steel, Common, valued at $120.00, or (Exch. 5.17),	62,040.	Swiss francs
Bonds:			
$10,000.	6% Dutch East Indies Bonds, due 1962, with interest earned from 9/1/25; at 102½, or	52,992.50	Swiss francs
$10,000.	6% Bonds of Portland Railway Light & Power Co., First Lien & Refunding, due 1947, valued, with interest from 5/1/25,— at 98¾, or	51,053.75	Swiss francs
$30,000.	6% Bonds of Republic of Haiti, Customs and General Revenue, due 1952, valued, with interest from 4/1/25, at 97, or	150,447.	Swiss francs
$ 8,000.	6% Bonds of States of Queensland, Australia, due 1947, valued, with interest from 8/1/25, at 104½, or	43,221.20	Swiss francs
$10,000.	7% Bonds of Republic of Chile, due 1942, valued, with interest due from 5/1/25, at 101, or	52,217.	Swiss francs
$10,000.	7% Bonds of Vertientes Sugar Co., due 1942, valued with interest from June, 1925, at 89, or	46,013.	Swiss francs
$10,000.	5½% Bonds of Republic of Cuba, due 1953, valued, with interest from 7/15/25, at 100, or	51,700.	Swiss francs

$15,000. 4% Cons. Debenture stock of Canadian Pacific Ry., valued with interest from 7/1/25, at 80½, or	62,427.50	Swiss francs
$10,000. 7% Argentina Bonds, due 1927, valued, with interest from 8/1/25, at 104¼, or	52,863.25	Swiss francs
$10,000. 5% First Mortgage Bonds of Cuba Railroad Co., valued with interest from 7/1/25, at 87, or	44,979.	Swiss francs
$10,000. 6% Bonds of Oriental Development Co., due 1953, valued with interest from 3/15/25, at 85, or	43,945.	Swiss francs
59 $10,000. 6½% First Mortgage Bonds of Willis-Overland Co., due 1933; valued with interest from 9/1/25, at 101¼, or	52,604.75	Swiss francs
$15,000. 7% German 1924/49 (American branch) Bonds, valued, with interest from 4/15/25, at 98, or	75,999.	Swiss francs
$10,000. 6% Argentina 1958 B. Bonds, valued, with interest from 6/1/25, at 95½, or	49,373.50	Swiss francs
$20,000. 7% bonds of Alleg. Electricitas Gesselshaft, due 1945, valued, with interest from 7/1/25, at 93½, or	96,579.	Swiss francs
(The rate of exchange used throughout, was 5.17)		

The above securities, physically located in New York City, in the custody of a New York banking house at decedent's death, have not heretofore, for the purpose of administration, been treated as part of the American estate, except that said five items of stocks in American corporations, listed above under the heading "Stocks", were included in the Estate Tax Return as "Jointly Owned Property" and were treated in the deficiency letter attached to the Amended Petition herein, at their full (not their one-half) values.

(b) Real estate (or interests therein) located in the United States, the reasonable, fair value of which at the date of death, was $2501.00, the amount at which it was returned by the executor and determined by the Bureau.

6. That the gross foreign estate (i. e. outside of the United States) included both tangible and intangible personal property, having a total value at the date of decedent's death, of $277,635.59.

60 7. That in due course the Liberty Central Trust Company, as executor, administered the estate heretofore treated as the American estate, and made final distribution of the residue of said estate to itself as Trustee of the trust created by the will, and was discharged as executor. Thereafter, the "St. Louis Union Trust Company", a trust company

organized and doing business under the laws of Missouri, succeeded the Liberty Central Trust Company as Trustee of said trust, and took over said trust estate. By said succession the St. Louis Union Trust Company, as sole distributee of the residue of said probated estate, is the legal successor in title and liability to said Liberty Central Trust Company, executor, and said trust estate in the hands of said St. Louis Union Trust Company as Trustee, will have to pay any additional estate tax that may be assessed, and for this reason was made one of the petitioners herein.

8. That by trust indenture made by decedent, January 1, 1920, a copy of which is attached hereto, marked Exhibit "B", decedent transferred, assigned and delivered to "Mercantile Trust Company", of St. Louis, in trust, the bonds therein described, then aggregating in their principal face amount, $118,000.00, and the assets of this trust estate on hand at decedent's death, including accrued income of $989.49, then had a value of $101,421.24. This transfer was in trust, to hold, manage, and dispose of as an active trust, and to pay the net income thereof to decedent's daughter, Alma Feraldo, during her life, and thereupon for disposition as shown in the attached Exhibit "B". The "Mercantile Commerce Bank and Trust Company", of St. Louis, Missouri, is successor Trustee to said Mercantile Trust Company in said trust. Decedent's said daughter was born February 1, 1891, and survived
61 the decedent. This trust was in existence when decedent died, and is still alive.

9. That in determining the deficiency set forth in the deficiency notice, a copy of which is attached to the Amended Petition herein, the respondent included in decedent's gross estate the reversionary interest in said trust corpus subject to the life estate of said Alma Feraldo, at the value of $34,544.06. This value is agreed to have been the correct value of said remainder interest at decedent's death.

10. That the item of 300 shares of Gillette Safety Razor Company stock included in the gross estate as "Jointly Owned Property", at a value of $25,462.50, was the individual (separate) property of Mrs. Alma Feraldo, the decedent's daughter, and, therefore, is to be excluded from the value of the gross estate of decedent, heretofore treated as the American estate.

11. That by their original petition herein (Assignment of Error (2), paragraph C, pages 3 to 4), petitioners assigned error in respect of Items 1 to 5, inclusive, of "Jointly Owned Property" as included in the return. Said Item 1 related to

the 300 shares of stock in Gillette Safety Razor Company last above mentioned. The other four items consisted of: 500 shares, Armour & Co. "A" stock; 500 shares in Armour & Co. "B" stock; 500 shares in Gimbel Brothers Company; and 100 shares preferred in U. S. Steel Co. The petitioners in their Amended Petition withdrew their original Assignment of Error as to said Items 2 to 5 inclusive, but this withdrawal is necessarily subject to the question of dominion or situs.

62 12. That the gross estate heretofore considered as within the United States, had a value at decedent's death, of $612,815.29.

This does not include:

The value of said 300 shares of stock in Gillette Razor Co., found to be the property of decedent's daughter,	$ 25,462.50
The remainder value of said assets transferred in trust, the propriety of including which is herein disputed by petitioners,	34,544.06
Total of said two excluded items,	$ 60,006.56

13. That the estate has expended the following amounts on account of administration expenses and claims against the estate:

Funeral expenses	$ 11,375.22
Executors' commissions	23,308.66
Attorneys' fees	7,500.00
Miscellaneous administration expenses	1,007.40
Debts	76,637.98
Taxes	21,531.84
Total	$141,361.10

In determining the value of the net estate, the estate is entitled to a deduction on account of the expenditures set forth in paragraph 13 above, not to exceed 10% of the value of the gross estate situated in the United States.

14. That the estate has paid State inheritance taxes amounting to $6,793.03, and is entitled to a credit against the Federal estate tax on account thereof, not to exceed 25% of the estate tax.

63 15. That this case is submitted to the Board for decision upon the basis of the pleadings and this stipulation, and both parties request that the Board allow sixty days from the filing hereof, in which to file briefs, provided, however, that both parties reserve all rights to contest, by appropriate proceedings, any decision the Board may render in this case.

DANIEL N. KIRBY,
Counsel for Petitioners.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

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64 Exhibit "A".

Copy

of the authentic dispositions of the last Will and Testament of William-Julius, son of Charles-Frederic Orthwein deceased and of Carolina Nulsen, husband of Alma Espenhaim, without profession, native of the United States of America, residing at Territet, born in St. Louis on the 21st of August, 1867, deceased at his domicile, Villa du Midi, Territet, on the 4th day of September 1925.

Testament

Before me Henri-Samuel Bergier, a Notary at Lausanne (Canton of Vaud, Switzerland), for the District of Lausanne

appears:

Mr. William-Julius, son of Charles-Frederic Orthwein deceased, a citizen of the United States of North America, residing at Territet, parish of Planches-Montreux, (Canton of Vaud, Switzerland) without profession, who personally known by me Notary, appearing to me as being of sound mind and acting under the control of his will alone, has required my ministry for taking down his testament which he expressed in the following terms:

Article First.

I annul all the wills that I have made anteriorly to this day, the last one having been signed on the eighteen of January nineteen hundred and twenty three at Me. Bergier's, Notary at Lausanne.

Article Second.

For all that concerns the securities which I have disposed of by the pact of succession I signed before the Notary Bergier on the twelfth of December nineteen hundred and
65 twenty one, I declare that I refer to said pact which retains all its value, undergoes no modifications and it confirmed by me in its whole. I therefore confirm expressly my will to the effect that these securities be attributed conformably to what is said in the pact of succession of the twelfth of december nineteen hundred and twenty one.

Article Third.

I appoint my Executors the Liberty Central Trust Company, at Saint Louis (State of Missouri, United States of North America) for all that relates to my American affairs, and "la Societe de Banque Suisse" (Swiss Bank Corporation) branch of Lausanne, for all that relates to my affairs of Europe as well as to my "outside of Europe" affairs that I will have instrusted it with during my life-time.

Article Fourth.

I institute my only daughter, Mme. Alma Feraldo nee Orthwein the sole heir to all the property I have not disposed of specially, my will being she have the whole of said property, with the reservation of the rights that the Swiss law grant to the widow and with the reservation also of the restrictive clauses mentioned in the pact of succession of the twelfth of December nineteen hundred and twenty one.

On account of the sickness my wife is afflicted with, I desire that her legal representative, after my death, choose the usufruct of half the property my daughter will inherit of me, in place and stead of the fourth in property.

The Testator reads the above testament and the Notary calls as witnesses the citizens Auguste Mounoud of
66 Thioleyres, coffee house keeper, and Frederic Eternod, of Baulmes, merchant, both residing at Planches-Montreux, Swiss citizens, of age and in possession of their civic rights.

In their presence, the two witnesses in the presence of each other, the testator, William-Julius Orthwein, declares that he has read the hereinabove testament and that it is the expression of his last will, and he signs it affixing his name thereto in the presence of the Notary and of the witnesses, the whole done at Territet (Canton of Vaud, Switzerland) Villa du

midi, on the twenty eight of November nineteen hundred and twenty three at sixteen o'clock.

Signed: "WILLIAM J. ORTHWEIN;
H. S. BERGIER, Not.

The hereinabove named witnesses declare that the testator made to them the hereinabove declaration, that he signed the deed in their presence and that he appeared to them as being able to dispose and act freely, then they sign with the Notary, at Territet, the twenty eight of November nineteen hundred and twenty three at sixteen o'clock and five minutes.

Signed: A. MOUNOUD;
FRED ETERNOD;
H. S. BERGIER, Not.

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67 Exhibit "B".

This Indenture made this 1st day of January, 1920, by and between William J. Orthwein, of the City of St. Louis, State of Missouri, (temporarily sojourning in Switzerland), party of the first part, hereinafter called "Grantor", and Mercantile Trust Company, of the same City and State, as Trustee, party of the second part, hereinafter called "Trustee", Witnesseth; That,

Whereas, the Grantor owns the personal property hereinafter described, and having other property with which to meet his personal needs, desires by this Indenture to make for the benefit of his daughter, Mrs. Alma Feraldo, a citizen of Peru, and the wife of Pablo Feraldo, of Lima, Peru, as the life beneficiary of the trust hereby created, an absolute and irrevocable gift and settlement of the property hereinafter described, so that the Grantor shall during the life of his said daughter have no further individual or beneficial interest therein, but the same and the net income thereof shall be held managed and disposed of, by the Trustee of the trust hereby created, for the benefit during her life of the grantor's said daughter, and in trust for her support, maintenance and other benefit, all upon the conditions and trusts, subject to the limitations, and for further and final disposition to the persons, upon the conditions and limitations, and in the manner, hereinafter set out;

Now, Therefore, in consideration of the premises and of the love and affection which the Grantor bears to his said daughter, and of the sum of One Dollar ($1.00) to him in hand paid

by the party of the second part, the receipt of which is hereby acknowledged, the Grantor does hereby convey, assign,
68 transfer and deliver to the party of the second part as Trustee, and to its successor or successors in trust, each and all of the following described items of personal property, together with the choses in action evidenced thereby, and all rights of security and of action afforded to each of said items by the various forms of security now existing or which may hereafter exist in respect thereto, viz.:

$ 25,000 United Railways of St. Louis 1st General Mortgage 4% bonds dated Sept. 20th, 1899, due July 1, 1934, coupons Jan. 1st, July 1st. Nos. 16542 to 16549, inc. of both, 16591 to 16593, inc. of both, 16600, 18670 to 18679, inc. of both, 18683, and 16598 and 16599.

13,000 New Long Distance Telephone Co. of Indiana 1st Mortgage 5% Bonds dated Jan. 1, 1903, due Jan. 1, 1923, coupons Jan. 1st and July 1st. Nos. 117, 218, 220, 226, 518, 645 to 649, inc. of both, 695, 696 and 697.

1,000 Southern Pacific Railway Co. 20-yr. Convertible 5% Gold bond dated June 1, 1914, due June 1, 1934, coupons June 1st and Dec. 1st No. M 1877.

15,000 Illinois Central Railway 4% Collateral Gold Bonds dated March 31, 1888, due April 1, 1952, coupons April 1st and Oct. 1st. No. 1349 for $1,000. Nos. 14066, 14099, 14381, 14411 to 14413, inc. of both, 16533, 16638, 14476 to 14482, inc. of both, 14496, 14543, 14623, 14655, 14813, 14857, 15422, 15424, 15431, 15468, 15473, 15523, 15524 for $500 each.

10,000 Chicago, Milwaukee & St. Paul Railway Co. temporary 4% bonds dated Dec. 1, 1915, due June 1, 1925. Coupons due June 1st and Dec. 1st. Nos. 31481 to 31490, inc. of both.

19,000 Granby Mining Company 1st Mortgage 5% bonds dated June 1, 1916, due June 1, 1926, coupons June 1st and Dec. 1st. Nos. 1289 to 1293, inc. of both, 1295, 1298, 1299, 1300 to 1303 inc. of both, 1305 to 1308, inc. of both, 1461, 1468 & 1469.

10,000 Republic of Cuba External Loan of 1909 4-1/2% bonds dated Aug. 2, 1909, due Aug. 1, 1949, coupons due Feb. 1st and Aug. 1st. Nos. 13721, 13722,

13881, 14152, 14153, 14176, 14177, 14864, 14865 and 14890.

25,000 United Kingdom of Great Britain & Ireland 5-1/2% bonds dated Feb. 1, 1917, due Feb. 1, 1937, coupons due Feb. 1st and August 1st. Nos. M126902 to M126921, inc. of both, M80971 and M140136 to M140139, inc. of both.

$118,000

69 Said securities and rights are hereby conveyed, assigned, transferred and delivered to the Trustee, in trust to hold, manage and dispose of the same as an active trust estate, subject to the following trusts, duties, powers, conditions, and limitations:

1. It shall be the duty of the Trustee, and in the performance thereof the Trustee shall have power in its absolute discretion except as herein otherwise provided:

(a) To collect the income from the trust estate as the same accrues, and during the life of the Grantor's said daughter (unless the trust shall be sooner terminated pursuant hereto), to pay the net income thereof to said daughter, or to expend the same for her support, maintenance or such other benefit as the Trustee in its discretion deems wise on her behalf; it being intended that the net income shall be paid direct to her rather than expended by the Trustee for her benefit, during such periods as the Trustee in its discretion thinks that conditions surrounding her and influencing her use of said net income are such that she herself will receive and use the same for her own benefit and that of her children (if any), and that whenever and as often as the Trustee shall, in the exercise of its discretion, conclude that the conditions or surroundings affecting my daughter are such that it would be better for her if the Trustee should itself make a part or all of the expenditures of income, or that she should require the prior approval of the Trustee to the making of such expenditures, then the Trustee may either make such expenditures itself or require its prior consent to the making of such expenditures requested by my daughter. In any event it is intended that the entire net income shall be either paid to her or expended for her benefit. Such payments of net income to my said
70 daughter shall be made monthly by the Trustee crediting the amounts to her in her name upon open deposit account subject to draft or check by her, or at her election by

depositing the same in some bank to be designated by her, to the credit of her individual account subject to draft or check by her.

(b) To make such investments and reinvestments of the trust estate as to the Trustee shall seem wise, without any limitation whatever in respect of the character of property or securities in which such investments may be made, except that while the trust exists the Trustee shall consult and be guided by the advice and wishes of the Grantor's daughter during her life and so long as she is competent and willing to advise, in relation to the purchase, sale, or exchange of assets belonging to the trust estate. The competency and willingness of said daughter to advise concerning the investments, shall be determined by the Trustee mailing a registered letter, addressed to her at the last residence given by said daughter to said Trustee, advising her of the proposed purchase, sale or exchange of the investments. Upon the failure of said daughter for any reason to address a letter to the Trustee, said letter to be mailed so that it will be delivered to the Trustee within sixty (60) days after the mailing of the registered letter by my said Trustee, indicating her wishes in the matter, then the Trustee shall be empowered to act according to its judgment and discretion provided however, that in case the Trustee, within thirty days after having mailed its said letter to said daughter, shall receive advice by cable that she has mailed a letter to the Trustee, then the Trustee shall await the receipt of her said letter before acting. To make separate investments for the trust estate hereby created, or to make joint investments with other persons or trusts. Also, to exercise for the benefit of the
71 trust estate as complete powers of control, protection, management, conversion, investment and reinvestment of the trust assets and every part thereof, as the Trustee could have exercised had it been the absolute owner thereof in its own right; and the foregoing broad grant of general powers is not intended to be cut down or limited in effect by the enumeration and grant in this Indenture of certain specific powers.

(c) Upon the distribution, to make division in kind or otherwise of the trust property, and to convert part or all into cash for the purpose of division; and the Trustee's valuation of any trust property for the purpose of any division or distribution hereunder shall be conclusive on all persons claiming hereunder.

(d) To terminate the trust hereby created, prior to either of the times herein elsewhere limited, and at such time as the Trustee may deem it wise that the trust be terminated.

In case of and upon such earlier termination, the Trustee shall pay, convey and deliver the trust estate then on hand, to the Grantor if then living; and if he be not alive, then to his said daughter if then living; and if she be not alive, then to her children (if any) then living, in equal shares, and in case there be no such children, then to the then living "next of kin" of the Grantor, that is to say, to those persons living at the time of the said earlier termination of the trust, who would have been the next of kin of the Grantor, and in the same proportions, as defined by the statutes of the State of Missouri, U. S. A. now in force, governing the distribution of the personal estate of an intestate decedent resident in Missouri, had the Grantor died (at the time of such earlier termination of the trust) intestate, a resident of Missouri, and owning said trust estate absolutely, and had said stat-
72 utes been in force at said time.

(e) To determine whether receipts constitute principal or income of the trust estate, and whether disbursements should be charged to principal or income; and the conclusion of the Trustee upon each such matter shall be binding on all persons claiming or to claim hereunder.

II. Upon the death of the Grantor's said daughter:

(a) If the Grantor be still living, the Trustee shall forthwith (unless the trust shall have been terminated earlier, pursuant to other provisions herein), transfer, pay, and deliver the entire trust estate to the Grantor, to be his absolutely.

(b) If the Grantor be not then living, but the wife of the Grantor, Alma Orthwein, who is now an invalid, be then living, then the Trustee shall continue to hold the trust estate hereunder, and shall not make any payments of net income direct to or upon the order of said Alma Orthwein, but shall expend said net income or so much thereof as the Trustee deems wise, for the maintenance, support, care of, and such other benefit to, said Alma Orthwein, as the Trustee, in its sole discretion, deems wise and expedient in her behalf.

(c) Upon the death of said Alma Orthwein, if and after she shall, pursuant to the above provisions, have received the benefit of the income of the trust estate, or upon the death of the Grantor's said daughter, in case said daughter be survived by a child or children but not by the Grantor or the said wife of Grantor, then the Trustee shall continue to hold the

trust estate for the equal benefit of the children of said daughter, using the net income for their support, maintenance or other benefit or paying the same direct to them as the Trustee deems wise, during their respective minorities as defined by the present laws of Missouri, and distrib-
73 uting and paying to each of them upon his or her attaining such majority, and to the survivors of them, the share of such child in the trust estate; provided however, that in no case shall such final distribution be postponed longer than twenty-one years after the death of the longest to survive of the Grantor, his said wife and his said daughter, and that in case of such termination of the trust estate by lapse of time pursuant to the said limitation contained in this proviso, the Trustee shall divide, distribute, pay, convey and deliver the trust estate then on hand, among and to those persons who are the beneficiaries hereunder of the net income thereof at the time of such termination, and in the same proportions in which they are then entitled hereunder to the benefit of said net income.

(d) If upon the death of the Grantor's said daughter, neither the Grantor, nor his said wife, nor a child or children of his said daughter, then survive, or, if after the death of said daughter and pursuant to the provisions of subdivision "(c)" last above, the trust estate is being held for the benefit of a child or children of said daughter of the Grantor and said child (if there be only one), or all of said children, shall die before having received distribution of the principal, then the Trustee shall forthwith make final distribution of the trust estate (with the undistributed income, if any then on hand), to such persons, in such proportions, and upon such conditions, limitations, uses or trusts, as the said daughter of the Grantor may by her last will have appointed or provided,—and in default of such appointment or provision, then among and to the "next of kin" of the Grantor, i. e., to those persons living at the time of the said termination of the trust, who would have been the next of kin of the Grantor and in the same proportions, as defined by the statutes of the
74 State of Missouri, U. S. A., now in force, governing the distribution of the personal estate of an intestate decedent resident in Missouri, had the Grantor died (at the time of such termination of the trust) intestate, a resident of Missouri, and owning said trust estate absolutely, and had said statutes been in force at said time. All distributions or payments of net income pursuant to this Indenture shall be made in convenient installments, not less often than semi-annually; provided however, such payments of net income to my said

daughter shall be made monthly by the Trustee crediting the amounts to her in her name upon open deposit account subject to draft or check by her, or at her election by depositing the same in some bank to be designated by her, to the credit of her individual account subject to draft or check by her.

III. The trust estate created hereby, is intended to provide for and secure to the beneficiary or beneficiaries of the net income thereof, during the life of the trust, a sure income from the trust estate, therefore: (a) all benefits given hereby to the said daughter of the Grantor or passing to her daughters (if any), shall pass as her (or their) sole and separate equitable estate free from all right, title, interest, courtesy, control, community rights, and every other marital or statutory interest or right of any husbands said daughter (or her daughters) may at any time have; and (b) neither the assets constituting the principal of the trust estate, nor any right hereby given to any beneficiary or beneficiaries to receive the income or principal thereof, shall (until such beneficiary or beneficiaries shall have actually received distribution thereof), be subject to or capable of sale, voluntary or involuntary transfer, assignment, mortgage or anticipation in said or any other method, and all such attempted sales, transfers, assignments, mortgages or anticipations shall be void; and no title or right of possession capable of voluntary or involuntary disposal by any beneficiary shall pass hereunder in respect of such trust estate or the income thereof, until and to the extent that the Trustees shall pursuant hereto have actually made distributions or payments to such beneficiary.

IV. The trust estate hereunder shall include, and all the provisions hereof shall apply to, not only the assets hereinabove specifically described, but also such additional property as the Grantor may hereafter from time to time add thereto by transferring or delivering the same to the Trustee hereunder as additions to the trust estate hereby created.

V. In case of the resignation or refusal, failure or inability to act, or of the retirement from active business, of the Trustee hereby appointed or of any successor trustee, or in case the said daughter of the Grantor, shall at any time deem it expedient in the interest of the beneficiary or beneficiaries, to appoint a new trustee hereunder, then the said daughter of the Grantor, may appoint a successor in trust, by written instrument signed by said daughter and delivered to the new trustee thus appointed; and any new trustee thus appointed shall thereby and thereupon have all the title powers and du-

ties of the Trustee herein named, and the retiring trustee shall pay over, transfer and account to the new trustee for all the trust estate then on hand.

All provisions herein made in respect of the Trustee herein named, are intended to apply with like effect to each and every successor trustee. Each and every reference herein to the Trustee shall, unless otherwise expressly indicated, refer to and include the trustee at the time in such instance referred to.

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VI. Said Mercantile Trust Company hereby accepts the trust created by this Indenture, and agrees to hold said property upon and subject to the trusts herein expressed; and the Trustee agrees to perform the duties herein imposed upon the Trustee, being personally liable only for its own wilful neglect or default. The compensation of the Mercantile Trust Company for its services hereunder, shall be five per centum of the income received and disbursed by it, and on final distribution of the corpus of the trust estate, five per centum of the then fair value of the corpus.

In Witness Whereof, the Grantor has hereunto set his hand and seal, and the Trustee has duly executed this instrument (in two counterpart copies) on the day and year first above written.

WILLIAM J. ORTHWEIN (Seal)

MERCANTILE TRUST COMPANY,
Trustee,
By William Maffitt,
Vice and Acting President.

Attest:
J. J. Farell,
Assistant Secretary.

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Praecipe for Transcript.

Filed April 28, 1934, United States Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Ap-

peals for the Eighth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:—
   (a) Petition, excluding annexed copy of deficiency notice.
   (b) Answer.
   (c) Amended petition, including annexed copy of deficiency notice.

78 (d) Answer to amended petition.

3. Findings of fact, opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Stipulation of facts.
6. This praecipe.

ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 26 day of April, 1934.

DANIEL N. KIRBY,
Attorney for Respondents on Review.

RFS/y 3/19/34.

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79 (Clerk's Certificate to Transcript.)

United States Board of Tax Appeals.

Washington.

Commissioner of Internal Revenue, Petitioner
Docket No. 47633. vs.
St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; joined by Mercantile Commerce Bank & Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust created by Trust Indenture of William J. Orthwein, Dated January 1, 1920, Respondents.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 78, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 21st day of May, 1934.

Seal
U. S. Board
of Tax Appeals
1924.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

Filed May 26, 1934. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. Frank J. Wideman and Mr. Sewall Key as counsel for petitioner)

United States Circuit Court of Appeals, Eighth Circuit

No. 10016

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE, ETC., ET AL.

The clerk will enter my appearance as counsel for the petitioner.

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, June 4, 1934.

(Appearance of Mr. Robert H. Jackson and Mr. Frank T. Horner as counsel for petitioner)

The clerk will enter our appearances as counsel for the petitioner.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

NK T. HORNER,
Special Attorney, Bureau of Internal Revenue.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 4, 1934.

(Appearance of Mr. L. W. Post as counsel for petitioner)

The clerk will enter our appearances as counsel for the petitioner.

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
L. W. POST,
Special Assistants to the Attorney General.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 30, 1934.

(Appearance of Mr. Maurice J. Mahoney as counsel for petitioner)

The clerk will enter my appearance as counsel for the petitioner.
MAURICE J. MAHONEY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 26, 1934.

(Appearance of Mr. Daniel N. Kirby as counsel for respondents)

The clerk will enter my appearance as counsel for the respondents.
DANIEL N. KIRBY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, June 5, 1934.

Order of submission

November term, 1934

TUESDAY, NOVEMBER 27, 1934.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, for petitioner, continued by Mr. Daniel N. Kirby for respondent, and concluded by Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, for petitioner.

Thereupon, this cause was submitted to the court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

Opinion

United States Circuit Court of Appeals, Eighth Circuit

No. 10016. November term, A. D. 1934

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased, et al., respondents

On petition to review decision of United States Board of Tax Appeals

January 17, 1935

Mr. Maurice J. Mahoney, Special Assistant to the Attorney General (Mr. Frank J. Wideman, Assistant Attorney General, and Mr. Sewall Key and Mr. L. W. Post, Special Assistants to the Attorney General, were on the brief), for the petitioner.

Mr. Daniel N. Kirby (Mr. Arthur B. Shepley, Jr., and Messrs. Nagel, Kirby, Orrick & Shepley were with him on the brief), for the respondents.

Before SANBORN, WOODBROUGH, and BOOTH, Circuit Judges

SANBORN, Circuit Judge, delivered the opinion of the court.

This is a petition to review an order of redetermination of estate taxes made by the Board of Tax Appeals (28 B. T. A. 107).

The question presented is whether the interest of a decedent in the corpus of a trust created by him should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death", under section 302 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304.

The essential facts are these: William J. Orthwein, a citizen of the United States residing in Switzerland, died testate September 4, 1925. The respondent St. Louis Union Trust Company, as successor trustee to Liberty Central Trust Company, is the sole residuary legatee under his will. On January 1, 1920, the decedent had created a trust primarily for the benefit of his daughter, who was then 29 years of age, married, and living in Peru. He transferred various of his securities to the Mercantile Trust Company, of St. Louis, Missouri, as trustee, to manage, invest, and reinvest the principal thereof, and to pay the income therefrom to his daughter during her lifetime. Upon the death of the daughter, if the grantor was then living, the trust property was to revert to him. If he was not then living, the trust was to continue for the benefit of his wife if she were living. In case neither the grantor nor his wife was living at the time of the daughter's death, the trust was to continue for the benefit of the daughter's children, if any, during their minority, and the trust property was to be divided between them as they became of age. In case of the death of all of the designated beneficiaries prior to the termination of the trust, the trust property was to go to those who were appointed to receive it by the daughter's will, or, if she left no will, to the next of kin of the grantor.

The trustee was given power to terminate the trust "at such time as the trustee may deem it wise that the trust be terminated." If the trustee should terminate the trust during the lifetime of the grantor, the trust property was to revert to him. If the trust was terminated after his death, the property was to go to the daughter if living; if not living, to her children; and, if there were no living children, then to the grantor's next of kin. The trust instrument recited that it was the desire of the grantor to make for his daughter, as the life beneficiary of the trust, "an absolute and irrevocable gift and settlement" of the trust property, "so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein."

The trust was not made in contemplation of death. It was not terminated by the trustee during the lifetime of the decedent. The daughter survived the decedent, the trust still continues for her benefit, and the respondent Mercantile-Commerce Bank & Trust Company has succeeded the Mercantile Trust Company as trustee.

At the date of the decedent's death, the trust estate was of the value of $101,421.24, and the value of the reversionary interest therein, subject to the life estate of the daughter, was agreed to be $34,544.06. The Commissioner of Internal Revenue added to the gross estate of the decedent the value of the reversionary interest in the trust, which resulted in a deficiency in estate taxes. On appeal the Board held that such interest was no part of the estate. Hence this petition to review.

The theory of the petitioner is that the decedent, in creating the trust, had reserved to himself a substantial interest in the trust property in the nature of a vested remainder, and that, since his death had the effect of making available to others this interest which might have reverted to him during his lifetime, the value thereof was properly taxable as a part of his estate, in view of *Klein* v. *United States*, 283 U. S. 231.

The *Klein case* dealt with a deed wherein the grantor had conveyed a life estate in real property to his wife, expressly reserving to himself the fee, which was to "remain vested in said grantor" in the event that the grantee "shall die prior to the decease of said grantor", but was to pass to the grantee if she survived the grantor. The court said (page 234 of 283 U. S.):

"It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed."

Had the decedent in the case at bar retained the legal title to all of the trust property, and had he provided that, upon his death, and not before, such title should pass to his daughter or to others or to a trustee for her or their benefit, the situation would be comparable to that in the *Klein case;* but here the decedent parted with the legal title to the trust property and to all beneficial interest therein during the life of the trust, and did so irrevocably. It was only in the case of the happening of certain contingencies over which he had no control, that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a termination by the trustee of the trust during the lifetime of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime, nothing more than a possibility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possi-

bility that the property would revert to him into an impossibility. The distinction between the *Klein case* and this case, as we see it, is that in the former the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto that would pass to anyone as the result of his death. In the *Klein case*, death was the generating source of title, while in this case the trust instrument was the source of title, and death merely destroyed a possibility that the trust property might revert to the grantor.

The conclusion which the Board reached appears to be fully sustained by the following cases: *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; *McCormick, et al.*, v. *Commissioner*, 13 B. T. A. 423, reversed in *Commissioner* v. *McCormick, et al.*, (C. C. A. 7), 43 F. (2d) 277, but affirmed per curiam in *McCormick, et al.*, v. *Burnett*, 283 U. S. 784; *Duke* v. *Commissioner*, 23 B. T. A. 1104, affirmed in *Commissioner* v. *Duke* (C. C. A. 3), 62 F. (2d) 1057, and in *Helvering* v. *Duke*, 290 U. S. 591, by an equally divided court; *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed in *Commissioner* v. *Wallace* (C. C. A. 2), 71 F. (2d) 1002.

The decision of the Board is affirmed.

United States Circuit Court of Appeals, Eighth Circuit

November term, 1934

THURSDAY, JANUARY 17, 1935.

No. 10016

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, as sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased; Joined by Mercantile-Commerce Bank and Trust Company, Successor Trustee to Mercantile Trust Company, of the Trust Created by Trust Indenture of William J. Orthwein, Dated January 1, 1920

On petition to review decision of United States Board of Tax Appeals.

This cause came on to be heard on the petition to review an order of redetermination of estate taxes made by the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed, by this Court, that the decision of the said Board of Tax Appeals in this cause, be, and the same is hereby, affirmed.

It is further ordered that the petition to review in this cause, be, and the same is hereby, dismissed, without costs to either party in this Court.

January 17, 1935.

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Guy T. Helvering, Commissioner of Internal Revenue, was petitioner, and the St. Louis Union Trust Company, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, Deceased, et al., were respondents, No. 10016, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the eighteenth day of February, A. D. 1935, a mandate was issued out of said Circuit Court of Appeals directed to the United States Board of Tax Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this eighth day of April, A. D. 1935.

[SEAL] E. E. KOCH,

Clerk Circuit Court of Appeals, Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1935

Supreme Court of the United States

Order allowing certiorari

Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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